Nos. 14-2222 & 14-2339

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nestlé Dreyer's Ice Cream Company,

Petitioner/Cross-Respondent,

-v-

National Labor Relations Board,

Respondent/Cross-Petitioner.

On Petition for Review of an Order of the National Labor Relations Board and Cross-Application for Enforcement of Same

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BRIEF FOR *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC.

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Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* Retail Litigation Center, Inc. discloses the following:

No counsel for a party authored this brief in whole or in part;

No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

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INTRODUCTION

This case represents the National Labor Relations Board's latest attempt to apply its erroneous decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (Aug. 26, 2011), *enf'd sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). ("*Specialty Healthcare*"). In that case, the Board eviscerated longstanding precedent for determining who votes in an initial union election, and created a novel standard that conflicts with the text of the statute, this Court's binding case law, and decades of Board decisions.

The Board's new "overwhelming community of interest" test, in which the Board effectively defers to the scope of the unit proposed by the union, is designed to facilitate a pro-union outcome—the union proposes only those gerrymandered units that it can win, and the test prevents the inclusion of other employee voters who should be in the unit. This case is a picture-perfect example of *Specialty Healthcare*'s pro-union effect: After multiple, unsuccessful attempts at organizing units at Dreyer's Bakersfield plant consisting of both maintenance and production employees, a union was able to hand-pick a unit of only maintenance employees who ultimately voted for unionization *See* A-159; A-161; A-163–164; *see also, e.g.*, *Macy's, Inc.*, 361 NLRB No. 4, at 6 (July 22, 2014) (union proposed—and

Board approved—unit of only cosmetics and fragrance employees after the union lost a storewide election).

This is the second time that the Board's decision to depart from the statutory mandate in order to create such a union-friendly test has reached this Court; this Court correctly struck down the prior attempt. In *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), this Court held that an "overwhelming community of interest" standard like the one adopted by the Board in *Specialty Healthcare* violates Section § 9(c)(5) of the National Labor Relations Act (the "Act"), which mandates that "the extent to which the employees have organized shall not be controlling" in making unit determinations. 29 U.S.C. § 159(c)(5).

The Board has run amok at imposing the unlawful "overwhelming community of interest" test—approving fractured unit after fractured unit, just like it did here. The Board approved a unit consisting of *only* maintenance employees, but left out production employees who work closely with the employees in the unit, enjoy identical benefits and similar wages, and are subject to the same terms and conditions of employment. This slice-and-dice approach to bargaining units disenfranchises employees, interferes with employer rights, and disrupts workplaces.

Nowhere has the agency's lawlessness been more harmful than in the retail industry. As a result of the Board's recent decision in *Macy's* to cast aside the

Board's longstanding whole-store unit presumption for the retail industry—despite promising not to do so in its *Specialty Healthcare* decision—small, fractured bargaining units are proliferating, hamstringing retail operations and multiplying administrative costs. The Board's new test encourages a single store's workforce to be dissected into dozens of bargaining units—like the Dreyer's production facility here—reducing flexibility, hampering customer service, and limiting opportunities for employees who could be denied the chance for advancement or additional work because of arbitrary union line-drawing.

This case presents an opportunity for this Court to reaffirm its prior, well-established, and well-grounded approach to evaluating bargaining units and rein in the Board's *ultra vires* agency action. For these and other reasons, this Court should grant Dreyer's petition and deny enforcement of the Board's order.

STATEMENT OF INTEREST

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues,

and to highlight the potential industry-wide consequences of significant pending cases.

The RLC strongly disagrees with the National Labor Relations Board's newfound "overwhelming community of interest" approach to bargaining unit determinations, which adversely affects the RLC's members and their businesses, complicating labor relations, threatening to embroil customers and other members of the public in labor disputes, and increasing the delay and costs associated with the Board's current representation process. The unit determination standards used by the Board have a significant impact on the RLC's members because most, if not all, fall under the jurisdiction of the Act. *Amicus curiae* thus submits that it has a significant interest in the Board's activities in this area that justifies participation in this case. The parties to this case have consented to the RLC's participation as *amicus curiae*.

ARGUMENT

As this Court held in *Lundy Packing*, an "overwhelming community of interest" test for bargaining unit determinations is contrary to the National Labor Relations Act. 68 F.3d at 1581–82. Yet the Board recently abandoned decades of Board precedent and adopted that very same standard in *Specialty Healthcare*, and has steadily applied the standard to other industries and employers, as it did here. This standard violates several provisions of the Act, causes substantial harm to

employers—particularly those in the retail industry—and should be rejected by this Court.

I. *Specialty Healthcare*—And The Board Decision Embracing *Specialty Healthcare* Here—Contravene Binding Circuit Precedent Interpreting Section 9(c) Of The National Labor Relations Act

As this Court held in *Lundy Packing*, an "overwhelming community of interest standard" conflicts with the mandate of Section 9(c)(5) of the NLRA. The Court specifically held that, "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 68 F.3d at 1581–82. In light of this binding precedent, the Board's decision below—and its decision in *Specialty Healthcare*—must be rejected.

In *Lundy Packing*, just as in this case, the Board applied an "overwhelming community of interest" standard in approving a fractured unit consisting of only a subset of an employer's workers. *Id*. at 1579–82. This Court, however, held that this new standard—which eschewed the traditional principles used in making unit determinations—violated Section 9(c)(5): "By presuming the union-proposed unit proper unless there is an overwhelming community of interest with excluded employees, the Board effectively accorded controlling weight to the extent of union organization. This is because the union will propose the unit it has organized." *Id*. at 1581 (internal quotation marks and citations omitted). The

"overwhelming community of interest" standard, this Court concluded, is a "classic § 9(c)(5) violation." *Id*.

This Court's reasoning in *Lundy Packing* is consistent with the intent of Congress in enacting Section 9(c)(5). That provision, Congress explained,

> strikes at a practice of the Board by which it has set up units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which employees have organized as ground for holding such units to be appropriate . . . While the Board may take into consideration the extent to which employees have organized, *this evidence should have little weight*, and . . . is not to be controlling.

H.R. Rep. No. 80-245, at 37 (1947), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 328 (1948) (emphasis added). In short, Section 9(c)(5) is intended to prevent artificial units of the sort at issue in this case and others like it. It prevents the Board from approving a proposed unit that lacks significance within the employer's organization, and that makes sense only as a division of employees likely to vote in favor of union organization. The Board, instead of deferring to the unit proposed by the union, must authorize the unit that is "appropriate" in the context of the employer's organization. In the retail industry, for example, that appropriate unit will usually be the employer's entire store. *See, e.g.*, *Haag Drug Co.*, 169 NLRB 877, 877 (1968); *Home Depot U.S.A., Inc.*, Case 20-RC 067144 (NLRB Nov. 18, 2011); *see also infra* Part III-C.

Because the decision below follows the lead of *Specialty Healthcare* and approves an arbitrary unit proposed by the union, the Board has not "operate[d] within statutory parameters," *Lundy Packing*, 68 F.3d at 1580, and therefore, this Court should reject the Board's decision and grant Dreyer's petition for that reason alone.

II. The Board's *Specialty Healthcare* Standard Applied In This Case Also Exceeds Its Statutory Authority Under Section 9(b)

The *Specialty Healthcare* standard, applied by the Board in this case, also cannot be squared with Section 9(b) of the Act, which mandates that the Board "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). That is true for several reasons.

First, *Specialty Healthcare* contradicts the Act's mandate that "*the Board*" (not a union petitioning for a unit) select "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b) (emphasis added). Congress specifically chose the Board to resolve disagreements about the appropriateness of a unit, instead of "leav[ing] the decision up to employees or employers alone." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 611 (1991). The overwhelming community of interest standard, however, effectively grants employees who favor organization—or unions—unfettered discretion to organize any portion of the

employer's workforce, in direct contravention of the statutory mandates. As long as the proposed unit of employees shares some minimal set of common characteristics, it will be approved unless the employer can show an "almost complete" overlap between employees within the unit and the rest of the appropriate workforce unit or facility. *Specialty Healthcare*, 357 NLRB No. 83, at 11. An approach to selecting "*the*" appropriate unit for collective bargaining that results in the approval of almost any selection of employees proposed by a union cannot be squared with the language of the statute: By requiring the Board to identify "*the*" appropriate unit, Congress intended that some proposed units should be deemed *inappropriate*.

Second, the *Specialty Healthcare* standard is inconsistent with the statutory requirement that the unit approved by the Board constitute a "craft, employer, or plant unit, or some subdivision thereof." 29 U.S.C. § 159(b). Self-selected units of employees—such as sales employees responsible for selling different products, *see, e.g., Macy's Inc.*, 361 NLRB No. 4—do not necessarily share a "craft"; they do not constitute the entire workforce of the employer; and they do not constitute the entire workforce of the plant (or store). *See* 29 U.S.C. § 159(b); *see also Specialty Healthcare*, 357 NLRB No. 83, at 7 nn.16, 17. Nor can such gerrymandered units be justified as "subdivisions" of such an organizational unit. The term "subdivision" is a term of art, also used, for example, in the Secretary of

Labor's wage and hour regulations, and refers to a group of employees with "a permanent status and continuing function"—not "a mere collection of employees." 29 C.F.R. § 541.103(a). That term cannot be used to refer to cobbled-together groups of employees united only by the fact that they wish to organize together.

Third, the *Specialty Healthcare* test defies the statutory mandate that the Board assure the "fullest freedom," 29 U.S.C. § 159(b), in the exercise of *all* rights guaranteed by the Act, including the right to refrain from supporting a union, *id.* § 157. *See Specialty Healthcare*, 357 NLRB No. 83, at 8 ("right to self-organization" is the "first *and central* right set forth in Section 7 of the Act") (emphasis added). The Board's approach to the right to organize in *Specialty Healthcare* places the right to organize ahead of the right to *refrain* from organizing and thus undermines the policy decision made by Congress to accord the right to refrain *equal* status—not second-class treatment. *See* Labor-Management Relations Act, 1947 (Taft-Hartley Act), ch. 120, sec. 101, § 7, 61 Stat. 136, 140; *see also* H.R. Rep. No. 80-510, at 47 (1947), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 551 (1948) (Congress's amendment of the Act in 1947 "emphasized that one of the principal purposes of the [Act] is to give employees full freedom to choose *or not to choose* representatives for collective bargaining") (emphasis added). Indeed, the freedom

to associate, or not, is one of the core freedoms of our nation. *See* U.S. CONST. amend. I.

The Board's *Specialty Healthcare* approach also ignores the very same "central" organizational right the decision claims to secure, as employees who are excluded from a petitioned-for unit based on a narrow unit determination test will be disenfranchised even if they share a community of interest with the narrower unit—merely based on a union's practical perspective on the difficulty of organizing a broader unit. *See Indianapolis Glove Co. v. NLRB*, 400 F.2d 363, 368 (6th Cir. 1968); *see also NLRB v. Meyer Label Co.*, 597 F.2d 18, 22 (2d Cir. 1979) (expressing concern that employees excluded from a unit "might be adversely affected because they might have their conditions set by a union which does not represent them"). "All statutory employees," however, "have Section 7 rights, whether or not they are initially included in the petitioned-for-unit," and *Specialty Healthcare*'s deference to units hand-picked by the union infringes these rights. *Macy's*, 361 NLRB No. 4, at 32 (Member Miscimarra, dissenting).

III. *Specialty Healthcare* And Subsequent Board Decisions Arbitrarily Overturned Decades Of Precedent, Causing Significant Harm To Employers And Employees Across Industries

A. *Specialty Healthcare* Was A Radical Departure From Longstanding Board Precedent

The overwhelming community of interest test adopted by the Board in *Specialty Healthcare* to determine the appropriate composition of an initial

bargaining unit also constitutes a radical, unreasoned departure from decades of the Board's own precedent. Prior to *Specialty Healthcare*, in assessing the appropriateness of a unit, the Board applied a community of interest test in which it looked to "whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit." *Newton-Wellesly Hosp.*, 250 NLRB 409, 411 (1980). Grounded in the statutory mandates of Section 9, *see supra* Part I and II, the "Board's [pre-*Specialty Healthcare*] inquiry into the issue of appropriate units . . . never addresse[d], solely and in isolation, the question whether the employees in the unit sought have interests in common with one another." *Id.*[1] The Board instead properly focused "on a careful examination of what interests are shared *within* and *outside the proposed unit*." *Macy's Inc.*, 361 NLRB No. 4, at 31 (July 22, 2014) (Member Miscimarra, dissenting) (citing *Wheeling Island Gaming*, 355 NLRB 637, 641–42 (2010)).

The Board in *Specialty Healthcare*, however, flipped on its head that longstanding, sensible community of interest test, which was well-grounded in the statutory mandate. Under *Specialty Healthcare*, a petitioned-for-unit of employees who share a community of interest is deemed to be an appropriate bargaining unit

[1] The Board has applied and reaffirmed this standard over the course of several decades. *See, e.g.*, *Publix Super Mkts., Inc.*, 343 NLRB 1023, 1024 (2004); *Seabord Marine, Ltd.*, 327 NLRB 556, 556 (1999); *United Foods, Inc.*, 174 NLRB 91, 91 (1969).

unless the employer demonstrates that employees in a larger unit "share an overwhelming community of interest with those in the petitioned-for-unit." 357 NLRB No. 83, at 13. Even if a larger unit would be "more appropriate," it will be rejected unless the employer can meet this demanding standard. *Id*.

The only decision prior to *Specialty Healthcare* of which *amicus* is aware in which the Board purported to apply an "overwhelming community of interest" standard to an initial unit determination was in *Lundy Packing Co.*, 314 NLRB 1042 (1994). As noted above, this Court overturned that prior decision as inconsistent with Section 9(c)(5) of the NLRA. *Lundy Packing*, 68 F.3d at 1581; *see also supra* Part I. In *Specialty Healthcare*, the Board adopted virtually the same standard that was overturned by this Court. The result is that employees with similar interests are prevented from voting on whether to unionize and, if so, how to collectively bargain.

As support for its overwhelming community of interest standard, the Board in *Specialty Healthcare* relied on *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). The D.C. Circuit, however, impermissibly borrowed the standard it used in *Blue Man Vegas* from accretion cases, in which employers seek to add new employees into a preexisting unit without an election—for example, employees from a newly-acquired department store. *See id.* at 422. In accretion cases, the right to vote is paramount, and employees can *only* be disenfranchised if

they share an overwhelming community of interest with an already-established union. In contrast, in the case at hand and similar cases being decided under *Specialty Healthcare*, employees excluded from a fractured unit are presumed to be disenfranchised *unless* an overwhelming community of interest can be shown. In other words, in accretion cases, employees are disenfranchised if they *are* included in the bargaining unit without getting to vote; but in certification cases, like the one at hand, employees are disenfranchised if they *are not* included in the bargaining unit because they do not get to vote. *Blue Man Group* thus provides scant support for the Board's application of the overwhelming community of interest test in the certification context.[2]

The Board's unreasoned departure from its own longstanding precedent alone warrants rejection of the Board's decisions adopting and applying the *Specialty Healthcare* standard. *See Lundy Packing*, 68 F.3d at 1583 ("While the Board may choose to depart from established policy, it must explicitly announce the change and its reasons for the change."); *see also J.P. Stevens & Co. Inc. v.*

[2] The only Board decisions cited in *Blue Man Vegas* from the initial representation context are plainly inapposite. *See Jewish Hosp. Ass'n*, 223 NLRB 614, 617 (1976) (describing *employer's characterization* of two groups of employees as sharing an "overwhelming community of interest"); *Lodgian, Inc.*, 332 NLRB 1246, 1255 (2000) (applying traditional community-of-interest analysis to include concierges in unit of hotel employees, while noting that shared interests in that case were "overwhelming").

NLRB, 623 F.2d 322, 329 (4th Cir. 1980); *Am. Pine Lodge Nursing & Rehab. Ctr. v. NLRB*, 164 F.3d 867, 876 (4th Cir. 1999).

B. The Board's Expansion Of *Specialty Healthcare* In Subsequent Cases Will Wreak Havoc On Workplaces Across The Country

The Board's decisions since *Specialty Healthcare*, including the decision below, reveal an agency run amok. The Board has applied its new, upside-down standard to a host of different employers and industries—beyond the initial context of *Specialty Healthcare*—and approved arbitrary and nonsensical units that do not track the organization of the employer's business and will cause untold damage to the affected workplaces. Here, the Board applied its erroneous test at a Dreyer's plant to approve a unit consisting only of maintenance employees, but not production employees, despite the fact that both sets of employees receive the same common employee handbook, are subject to "by and large" the same terms and conditions of employment, enjoy the same benefits, interact regularly throughout the workday, share common parking lots, time clocks, break rooms, and lockers, and wear identical company-supplied uniforms and safety equipment.

Dreyer's is not the only company that has been subjected to the Board's rubber-stamping of fractured, incomplete units. The Board has relied on *Specialty Healthcare* in approving the following units:

- Unit of sales employees in the cosmetics and fragrances department at a Macy's store, but excluding all other employees. *Macy's Inc.*, 361 NLRB No. 4.

- Unit of assemblers at a transit bus assembly plant, but excluding mechanics, technicians, and material handlers. *Prevost Car U.S.*, Case 03-RC-071843 (NLRB Mar. 15, 2012).

- Unit of rental car agents at a rental car agency, but excluding agency's return, lot, service, fleet, and exit booth agents, staff assistants, shutters, courtesy bus drivers, mechanics, and building maintenance technicians. *DTG Operations, Inc.*, 357 NLRB No. 175 (Dec. 30, 2011).

- Unit of line service technicians at an aviation-services company, but excluding all other employees, including customer service representatives, security and transportation employees, aircraft cleaners and maintenance employees, among others. *1st Aviation Servs., Inc.*, Case 22-RC-061300 (NLRB Sept. 13, 2011).

- Unit of canine welfare technicians and instructors at a guide dog breeding and training company, but excluding employees from the breeding, puppy-raising, kennel, admissions and graduate services, and veterinary departments. *Guide Dogs for the Blind, Inc.*, Case 20-RC-018286 (NLRB July 13, 2013).

- Unit of mechanics, but excluding all other employees in the service department. *IL Harley Davidson*, Case 13-RC-113245 (NLRB Oct. 30, 2013).

- Unit of dining area employees of a restaurant, but excluding all other employees. *Copper River of Boiling Springs*, Case 10-RC-098046 (NLRB Mar. 7, 2013).

The Balkanization of these workplaces, unconnected with the actual structure of these businesses, will impose untold harm: It will undermine the operation of the business, interfere with employee rights and opportunities, and invite impermissible gerrymandering of bargaining units in order to manipulate the results of elections. Arbitrary units that do not track the organization of the

employer's business—the inevitable result of the *Specialty Healthcare* standard—inherently exclude employees that are similarly situated to those within the unit. Here, excluded production employees have significant interests in common with the members of the unit, but nonetheless will have no opportunity to vote as to whether those interests should be made subject to collective bargaining. And if the union succeeds in organizing the maintenance employees, production employees will also be denied union representation in negotiations over benefits, pay, and other matters that equally affect all employees, thus effectively encouraging the union to sacrifice the interests of excluded members in favor of those who fall within the unit. Any resulting disparity in benefits and pay between employees performing similar jobs in close proximity could drastically undermine morale.

The tension among workers that will result from a proliferation of bargaining units can cripple an employer's business, while simultaneously weakening employees' bargaining power. Some units would possess more economic leverage than others simply by virtue of their individual function, and those units would be able to negotiate more favorable terms and conditions of employment. Other units, lacking such bargaining power, could see their benefits sacrificed to make up the difference. At Dreyer's, for example, maintenance

employees could shut down the entire plant by going on strike[3]—leaving the production employees who were left out of the unit and had no say in the strike vote temporarily without a job. Multiple little units could also strike consecutively, which could cripple a facility that had five or ten microunions. Moreover, divisions between employees would leave the workforce, in the aggregate, with less bargaining power, as employees would be unable to present a united face and could be played off against each other in the course of negotiations. Yet frequent strikes and stoppages by the various warring units would also make running the business practically impossible, and would impose economic hardship on workers in non-striking departments.

The approval of artificial units pursuant to *Specialty Healthcare* is also an open invitation to gerrymandering. The possibilities are endless. A union that believes it has the votes to organize some employees, but not others, need only seek to organize those employees who support the union. Unions now face little impediment to organizing by cherry-picking a small subset of employees with little regard for whether those employees constitute a practical bargaining unit, and with

[3] *Cf. Cont'l Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1090 (7th Cir. 1984) ("[D]ifferent unions may have inconsistent goals, yet any one of the unions may be able to shut down [an] employer's operations (or curtail its operations) by a strike.").

little regard as to whether the designated subset of employees has organizational significance within the employer's business.

The Board's decision here illustrates the point. The union originally filed a petition to represent a wall-to-wall unit consisting of both production and maintenance employees (after other unions made similar, unsuccessful attempts), and the regional director approved the unit. A-163–164. An election was held, and the entire plant voted to *reject* unionization. *Id.* The union *only then* determined that employees in the production department ought to be carved out from the entire plant, and that this smaller subset of employees would constitute an effective bargaining unit. The union filed a petition to represent the gerrymandered unit, and the regional director and the Board rubber stamped the unit. *See also Macy's, Inc.*, 361 NLRB No. 4, at 6 (union proposed—and Board approved—unit of exclusively cosmetics and fragrance employees only after the union lost a storewide election).

This was not the result intended by Congress when it instructed the Board to determine "the . . . appropriate" unit for collective bargaining. 29 U.S.C. § 159. To the contrary, the legislative history of the Act reflects Congress's concern that employees could, "by breaking off into small groups . . . make it impossible for the employer to run his plant." *Hearing on S. 1598 Before the S. Comm. on Educ. & Labor*, 74th Cong. 82 (1935) (testimony of Francis Biddle, Chairman, NLRB). A

unit that threatens to spark conflict between employees, decimate morale, hamper effective customer service, slash productivity, and compound administrative difficulties does not further the Act's purpose of advancing the "friendly adjustment of industrial disputes" and the "free flow of commerce," 29 U.S.C. § 151, and is not "appropriate" in any sense of the word.

C. The Board Has Used *Specialty Healthcare* To Eviscerate The Traditional "Wall-To-Wall" Presumption In The Retail Industry

Nowhere has the Board's embrace of *Specialty Healthcare* caused more disruption than in the retail industry. Because retail employees must work seamlessly within a store to provide comprehensive and effective customer service throughout the store, a half-century of Board precedent has consistently recognized a presumption in the retail context in favor of the whole-store unit.

For over a half-century, the Board has consistently recognized that, because of the nature of the retail industry, the appropriate bargaining unit should be the entire store. As early as 1957, the Board recognized that it had "long regarded a storewide unit of all selling and nonselling employees as a basically appropriate unit in the retail industry." *I. Magnin & Co.*, 119 NLRB 642, 643 (1957). The Board further explained that it has a "policy" favoring units that "encompass all store employees." *Kushins & Papagallo*, 199 NLRB 631, 631–32 (1972). Indeed, "a single store in a retail chain . . . is *presumptively* an appropriate unit for bargaining." *Haag Drug Co.*, 169 NLRB at 877; *see also Charrette Drafting*

Supplies Corp., 275 NLRB 1294, 1297 (1985) ("[T]he Board finds a single-facility unit presumptively appropriate."). A smaller unit would only be appropriate where a petitioner could show that employees within the proposed unit "constitute a functionally distinct group with special interests sufficient to warrant their separate representation." *Levitz Furniture Co.*, 192 NLRB 61, 63 (1971); *see also I. Magnin*, 119 NLRB at 643 (employees in proposed unit must be "sufficiently different from those of other employees to warrant their establishment in a separate unit").

As the Board explained in *Haag Drug Co.*, 169 NLRB at 877–78: "The employees in a single retail outlet form a homogenous, identifiable, and distinct group, physically separated from the employees in the other outlets of the chain; they generally perform related functions under immediate supervision apart from employees at other locations; and their work functions, though parallel to, are nonetheless separate from, the functions of employees in the other outlets, and thus their problems and grievances are peculiarly their own . . . ."

Perhaps recognizing the sea change wrought by the new standard it was adopting, the Board in *Specialty Healthcare* purported to cabin its holding to the limited context of that case (the non-acute health care industry). After acknowledging that it had "developed various presumptions and special industry and occupational rules in the course of adjudication," the Board announced in

Specialty Healthcare that its decision was "not intended to disturb any rules applicable only in specific industries." 357 NLRB No. 83, at 13 n.29. The Board reiterated this limitation in *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011), stating that "to the extent that the Board has developed special rules applicable to" a particular industry or type of employee, those existing "rules remain applicable" even after *Specialty Healthcare*. *Id*. at 5. The Board's promise was short-lived—less than three years later, in *Macy's*, the Board did an about-face and eliminated its longstanding presumption in favor of whole-store units in the retail industry. *See* 361 NLRB No. 4, at 13–19.

Although the Board paid lip-service in *Macy's* to its traditional retail presumption—the presumption "complements" *Specialty Healthcare*, the Board said—the real import of the Board's decision in *Macy's* was to abandon the logical preference for bargaining units composed of all employees in a single store.[4] The facts of *Macy's* illustrate this point: It makes no sense that cosmetics and fragrance employees are an appropriate unit to the exclusion of other employees subject to the same employment policies and compensation structures, working for

[4] The Board's decision in *The Neiman Marcus Group, Inc.*, 361 NLRB No. 11 (July 28, 2014), was likewise not a reaffirmation of the traditional retail presumption. In that case, the Board declined to approve a petitioned-for-unit of women's shoe sales associates in the "Salon" and "Contemporary" shoe departments, not in reliance on the wall-to-wall presumption for retail stores, but because the Board concluded that the two departments at issue did not share a community of interest. *Id*. at 2–4; *see also id* at 2 n.2.

the same supervisors, and responsible for selling similar products. 361 NLRB No. 4, at 1–4.[5]

In the retail industry, the single, overriding task of every employee in a store is to provide a seamless, hassle-free experience to customers interested in purchasing the employer's goods. That overriding task requires substantial integration of employees within a single store. Employees must be willing and able to answer customers' questions and respond to customers' requests regardless of whether they technically fall within the employees' assigned department. A single store is also typically a physically open environment; employees share a common workspace, and even backroom employees come into frequent contact with sales employees as they move inventory into, out of, and around the store. Sales employees work in even closer confines, and they necessarily have frequent

[5] In the immediate wake of *Specialty Healthcare*, the Board appeared to stand by its promise to maintain the traditional whole-store presumption. In *Home Depot U.S.A., Inc.*, Case 20-RC 067144 (NLRB Nov. 18, 2011), the Board declined to review a decision by a Regional Director approving a single-store unit. In that case, the Regional Director explained that the "Board has long favored wall-to-wall bargaining units in the retail industry." Slip op. at 12. The Regional Director emphasized the community of interest between employees in a single store: They "work at the same situs with common supervision, require no particular background or experience, come into contact on a daily basis, and overlap in many duties, despite assignment to a particular department." *Id.* at 14. For these reasons, the petitioned-for unit in that case, which included some jobs at the store but excluded others, was a "fractured unit," or "an arbitrary grouping of employees in [the] retail store setting." *Id.* at 15; *see also Odwalla, Inc.*, 357 NLRB No. 132 (Dec. 9, 2011) (rejecting unit under overwhelming community of interest test because unit was a "fractured unit").

contact and interchange with other employees. A single store is also, generally, under common management. Retail employees generally have similar skill sets and training; although some employees may have more experience in a particular role or with certain products, few if any employees have special education directed to their job, and all are ultimately exercising the shared skills of salesmanship and customer service. A unit smaller than a single store is ordinarily inappropriate because it rends apart a group of employees that otherwise would naturally function as a single unit.

The proliferation of bargaining units resulting from *Specialty Healthcare* and *Macy's* thus threatens to hamstring retail employers and curtail opportunities available to their employees. Retail companies generally strive to enable employees to assist customers seeking to purchase goods located anywhere in the store. Unions, however, typically insist that members of a unit have exclusive rights to perform their work and establish rigid work rules that establish what tasks bargaining-unit members can and cannot perform (which in turn affects the work that employees outside the unit can and cannot perform). These rules would prevent the employer from cross-training employees and, therefore, meeting customer expectations. Flexibility would suffer to the detriment of customers, employers and employees. For example, an employee in women's handbags could not walk a customer to her next destination in designer shoes and help her make a

purchase in that area; nor could the employee cover for an absent employee in men's formal apparel. An employee in household appliances could not be temporarily reassigned to electronics to cover a short-term staffing need or to earn additional wages. Selling employees could not be assigned non-selling tasks, and vice versa, in order to meet the needs of the business. Productivity and customer service would decline. Limited to their own departments or set of tasks, employees would also enjoy fewer skill-development opportunities, while rigid barriers would limit promotions and transfers. The Balkanization of retail stores would also result in fewer scheduled hours for most employees, because they would not be permitted to rotate into other departments or conduct various tasks.

* * *

The Board's continued treatment of *Specialty Healthcare*—in this case, *Macy's*, and a host of others—as effectively sweeping away the Board's prior precedents makes clear that the decision is being used by the Board to approve arbitrary, fractured units across varied workplaces and will continue to be unlawfully applied and expanded unless the Court takes action to reign in the agency. The Court should use this case as an opportunity to stop the steady accretion of error under *Specialty Healthcare* and reject *Specialty Healthcare*'s

overwhelming community of interest test, or, at a minimum, limit it to the special healthcare context of that case.[6]

CONCLUSION

For the foregoing reasons, the Court should grant Dreyer's petition for review and deny the Board's cross-application for enforcement.

Dated: January 13, 2015

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[6] In *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), the Sixth Circuit affirmed the Board's decision in *Specialty Healthcare*. Even if that case was correctly decided—and *amicus curiae* believe it was not—the Sixth Circuit did not address the propriety of the Board's expansion of the overwhelming community of interest test outside the narrow facts of that case. In any event, this Court is bound by its own decision in *Lundy Packing*.

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i) because it contains 5,846 words, as determined by the word-count function for Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: January 13, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2015, I caused the foregoing Brief For *Amicus Curiae* Retail Litigation Center, Inc. to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I further certify that on January 13, 2015, an electronic copy of the foregoing Brief For *Amicus Curiae* Retail Litigation Center, Inc. was served electronically by the Notice of Docket Activity on counsel for all parties.

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